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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 909

PHILAMON LABORATORIES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Philamon Laboratories, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled case, entered on February 1, 1962.

Opinion Below.

The opinion of the court below (Appendix B, *infra*, pp. 30-41) is reported at 298 F. 2d 176. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. Vol. I, pp. 1-8)[1] are reported at 131 N. L. R. B. No. 14.

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[1] "R" references are as follows: Vol. I to the Board's Appendix, and Vol. II to the Petitioner's Appendix (Respondent below). These were certified to this Court by the Clerk of the Court of Appeals below.

Jurisdiction.

The judgment of the Court of Appeals (Appendix C, *infra*, p. 42) was entered on February 1, 1962. The jurisdiction of this court is invoked under 28 U. S. C. §1254 (1) and 29 U. S. C. §160(e).

Questions Presented.

1. Whether the Board's determination that Petitioner violated Sections 8 (a) (1), 8 (a) (2), and 8 (a) (5) of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. Sec. 151 *et seq.*) was made upon the preponderance of the testimony taken, as required by Section 10 (e)[2] of the Act, and whether the Court of Appeals decision ordering enforcement of the Board's decree was correct.

2. Whether the Board failed to sustain its statutory burden of proof to establish the alleged unfair labor practices by substantial evidence on the whole record, as required by Section 10 (e)[3] of the Act, and whether the Court of Appeals decision ordering enforcement of the Board's decree was correct.

3. Even if questions 1 and 2 above are answered in the affirmative, whether the order of enforcement of the court below is not punitive rather than remedial under the special circumstances of this case.

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[2] Section 10(e) in part: "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint. . . ."

[3] Section 10 (e) in part: ". . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . ."

4. Even if questions 1 and 2 above are answered in the affirmative, whether under the special circumstances of this case, the policies of the Act require a modification of the court's order of enforcement to the extent of directing an election under safeguards guaranteeing a free choice to employees.

Statute Involved.

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, as amended, 29 U. S. C. 151 *et seq.*) are set forth in Appendix A, *infra*, pp. 26-29.

Statement.

Petitioner is a New York corporation, employing approximately 40 persons in all classifications. This includes engineers, executives, supervisors, clerical personnel, etc. It is a one man business, run by its President, Mr. Boris Grib (R. Vol. I, p. 88). In July and August, 1959, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 868 (hereinafter called the "Teamsters") started to organize the production employees. It took especial care not to inform some of the employees of its activities (R. Vol. I, p. 90; Vol. II, p. 3). Among those left in the dark was Anne Dee, the senior employee in the plant. She had been on her vacation when the activity started, and returned to work on August 3 (R. Vol. I, p. 219).

On August 6th the union sent a telegram to petitioner claiming representation of a majority of "your employees". No bargaining unit was specified. The union asked for an early meeting (R. Vol. I, p. 54). Mr. Grib left on his scheduled vacation the next day without replying.

On Monday, August 10 the union filed a petition for an election with the N. L. R. B., 2nd Region in New York, Case No. 2-RC-10170 (R. Vol. I, pp. 57-59). Notice of this was received at the Company offices on August 13 with a covering letter from the Board which for the first time delineated the bargaining unit. The letter also stated that a member of the Board's staff would shortly telephone concerning the matter (R. Vol. I, pp. 55-56).

Mr. Grib returned on August 13 (R. Vol. I, pp. 224, 239). While he was away, nothing was done by the Company relative to the union. Nevertheless, Anne Dee learned of the organization drive and started an anti-union campaign of her own. The record is clear that the company urged her to desist (R. Vol. I, pp. 220-22). She had previously been a union organizer and was aware of the implications of unionization (R. Vol. I, pp. 225-26). This fact was unknown to the company (R. Vol. I, pp. 225-26).

Also while Mr. Grib was away, the union tried to obtain a meeting for negotiation purposes with Mr. Shinerer, plant manager. The latter advised that he had no authority to treat with the union (R. Vol. I, p. 88).

On August 13 Mr. Grib was asked by Anne Dee to call a meeting of the employees and let them know what was going on. This was not unusual in this plant (R. Vol. I, p. 224). By this time as a result of Anne Dee's efforts *there appeared to be a change of sentiment on the part of* those employees who signed cards. The Company had done nothing up to this time.

In accordance with her request, a meeting was called during the afternoon of the 13th (R. Vol. I, p. 225). Each employee who testified for the Board seemed to have a different idea of what went on. Everyone was clear, however, that Mr. Grib stated there would be an election and that the choice was up to the employees; that he did not

believe the union had a majority, that it was "shooting in the dark". Employees then took over the meeting, asked Mr. Grib many questions, and made statements themselves. Among the questions directed at Mr. Grib was: "After the union is in the plant, will you be the same sort of guy you now are?" Mr. Grib said that he did not think he would change because there was a union in the shop (R. Vol. I, p. 227).

There were statements as to what they wanted. No promises were made by Mr. Grib. That same day, after the meeting, anti-Teamster activity by the employees continued at an industrial league baseball game (R. Vol. I, p. 228; Vol. II, pp. 27-28). This game was attended solely by employees. By this time the tide was going strongly against unionization. This continued the next day in the plant. That morning, August 14, two representatives of the union appeared and asked Mr. Shinerer for a meeting with the company. They offered to show designation cards to an outsider. They did not offer to show them to the company. Immediately thereafter they spoke to some of the employees and were advised of the meeting of the day before. They then made arrangements to meet later in the day with some employees (R. Vol. I, p. 91).

During the afternoon of August 14, on their own spontaneous action, a committee of employees asked to confer with Mr. Grib. He agreed (R. Vol. II, pp. 29, 30, 31). Items of wages, conversion of a profit sharing plan into wage rates, sick leave, and a general increase were discussed. No promises were made (R. Vol. II, p. 31). Mr. Grib said he would think about them.

Later that afternoon the employees held a meeting of their own. No company representatives were present. The employees decided to discontinue association with the Teamsters, and designated a committee to so inform the

union (R. Vol. I, pp. 163-65, 182). The union was so informed at about 5 P. M. that same day (R. Vol. I, pp. 91-93, 165-67).

On August 21, the union filed a withdrawal request of its election petition, approved by the Board August 24 (R, Vol. I, p. 59). On August 21 the company converted the profit sharing plan into its equivalent 10¢ per hour on the wage rate. This was an even exchange, of doubtful value to the employees (R. Vol. I, pp. 216-7, 235, 236, Vol. II, p. 16).

Over one month later, September 25, after no communications had been received by the company from anyone in the interim, a very modest sick leave plan was instituted (R. Vol. I, p. 217).

On October 9, the union filed an unfair labor practice charge against the company, and the company was notified on October 15, and complaint issued on October 20.

In November, a general 10¢ per hour increase was given as had been promised in April, long prior to any organizational activity (R. Vol. II, pp. 24-25, 33). Subsequently, the union again asked for recognition, and the company offered a speedy consent election (R. Vol. II, pp. 34-35, 38-39).

Hearings on the complaint commenced January 25, 1960. The list of bargaining unit employees who had been on the payroll from the preceding July 1 to September 30 (General Counsel's Exhibit 2, R. Vol. I, pp. 53-54) showed that by the time of the hearing ten of the thirty who were in the plant on August 13th had left of their own volition. Hearings on the complaint were concluded in early March, 1960.

The Board found that the meetings of August 13 and 14, the conversion of the profit sharing plan into wages, installation of the sick leave plan, the wage increase, and dealing with the employee committee on August 14 con-

stituted 8(a)(1) and 8(a)(2) violations. It found that the refusal to bargain with the Teamsters constituted an 8(a)(5) violation. The "remedy" ordered was compulsory bargaining with the Teamsters at this time, despite the turnover in the plant. The Board also issued the usual cease and desist directions (R. Vol. I, pp. 1-5). The Board's decision was issued on April 11, 1961, over thirteen months after the conclusion of the hearings. The Court of Appeals for the 2nd Circuit granted an order enforcing the Board's ruling on February 1, 1962.

Reasons for Granting the Writ.

1. (a) The record does not establish that the Board's findings of fact are based on the preponderance of the testimony taken, as required by Section 10(c) of the Act. Hence the court below erred in granting enforcement.

The record shows that the Board failed to sustain its statutory burden of proof to establish by substantial evidence on the whole record, the alleged unfair labor practice, as required by Section 10(e) of the Act. Hence the court below erred in granting enforcement.

The burden of proof, and the burden of conforming to the statutory standards always rests on the Board, *NLRB* v. *Cleveland Trust Co.*, 214 F. 2d 95 (6th Cir.). The requirement of substantial evidence "must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488 (1951). It is the responsibility of the Court to determine "whether the Board's findings are supported by substantial evidence and whether its conclusions are reasonably inferable from the evidence." *NLRB* v. *Sun Shipbuilding and Drydock Co.*, 135 F. 2d 15, 25 (3rd Cir.).

Using these qualitative standards, Petitioner asks reversal of the findings of unfair labor practice, and especially that part of the order of enforcement which directs compulsory bargaining. The decision and order of the court below fly in the face of the weight of precedent and the realities of the situation.

The law is clear that a good faith doubt of majority status warrants an election, not compulsory bargaining. *NLRB* v. *Remington Rand, Inc.*, 94 F. 2d 862, 868 (2nd Cir.), cert denied, 304 U. S. 576 (1938); *NLRB* v. *Minute Maid Corp.*, 283 F. 2d 705 (5th Cir.). There is no evidence whatsoever that Mr. Grib had anything but a good faith doubt of majority status. The telegram of August 6 demanded bargaining on behalf of *all* the employees. This was *superseded* by the election petition of August 10, received by the company on August 13 and which delineated a different bargaining unit. This advised the company that "a substantial number wish to be represented". It alleges that the petition is supported by "30% or more of the employees in the unit" (R. Vol. I, pp. 57-58). Note that nothing is said about a majority in an official governmental communication.

Mathematically, it is quite possible to have a majority of cards from *all* the employees, and still not have a majority of cards from persons in the appropriate unit. There is nothing to rebut the possible inference that this is what the employer thought.

Doubt is further expressed in Mr. Grib's remarks at the August 13 meeting. "He thought it was just another case of the union shooting in the dark. I think those were his words" (R. Vol. I, pp. 106, 131, 134, 154, 171). Some of the employees openly agreed, "then a couple of people there raised points that maybe they (the union) didn't know what they were doing or they were just taking a

chance in trying to organize the place, or something like that" (R. Vol. I, p. 106). Further, Mr. Grib stated: "He didn't care either way, that if we wanted it, we could have it" (R. Vol. I, p. 154). Again: "I do recall him saying that we had a perfect right to do what we were doing and that he was not going to try to stop us, that the choice was our own" (R. Vol. I, p. 126).

This uncontradicted evidence is not vitiated by the fact that Mr. Grib left on his vacation from August 7 to 13. During his absence he left the union a completely free field for organizing. Actually, if he were minded to destroy the union's status he would have stayed on the job, and then and there vitalized a campaign to defeat the union. Contrariwise, the evidence shows that the company tried to cut off anti-union activity (R. Vol. I, pp. 220-21). Finally, at no time did Mr. Grib exercise his right of free speech to detail some of the less ethical practices of the Teamsters.

The subsequent grants of benefits in themselves do not constitute a violation of Section 8 (a) (5). *NLRB* v. *Katz*, 289 F. 2d 700, 707 (2nd Cir.); cert. granted, 368 U. S. 811 (October 9, 1961) (No. 222, 1961 Term); *NLRB* v. *Bradley Washfountain Co.*, 192 F. 2d 144 (7th Cir.).

From the foregoing it is respectfully submitted that the decision and order of the court below violate the requirements of the Act in the findings of guilt regarding Section 8 (a) (5), and should be reversed.

(b) The court below failed to observe the required standard of evidence relative to the change of mind of the employees about Teamster affiliation. The evidence was uncontradicted that Anne Dee was largely responsible for the change of mind. She kept after the men. She pointed out to them that a union was unsuitable at Philamon; that gripes and grievances should be brought to the company for adjustment; that unions, and particularly the Team-

sters, have many undesirable features (R. Vol. I, pp. 96, 139, 147-48, 185-86, 190-91, 192-93, 201, 223, 224, 225-26, 227-30, 233-34, 240-45, 247, Vol. II, pp. 23, 26, 27-30, 31).

Disregard of this evidence warrants reversal on the ground that the *whole* record was not considered.

2. Not previously considered by this Court is the right of employees to change their minds. The effect of the decision below is to freeze the employees into Teamster membership without giving them a chance to change their minds. In this case the freezing of designation means that the dead hand of employees no longer on the premises control the economic lives of the persons now directly involved in what happens. The effect of what the court below has done is to create a situation where once having signed cards, both the employees who signed them and the current majority of employees who had nothing to do with it are irrevocably chained to Teamster representation. This is not in keeping with other decisions of the circuit courts which have held that the Act[4] puts the interests of the employees foremost, not the convenience of unions.

In *NLRB* v. *Hollywood-Maxwell Co.*, 126 F. 2d 815 (9th Cir.), the employees withdrew from their union after discovery that the business agent had been bribed by the employer. The court said, p. 820:

> "We are unable to follow the mental processes by which the Board refused to recognize the revocations and seeks to compel the revokees to be represented by the discredited local of the C. I. O. Union.

[4] Section 7 reads in part "Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ." See also Section 1(b) of the Act (Appendix A, p. 26).

> Congress makes it clear by Sections 1 and 7 of the Labor Act that the laborers' right to 'form' their unions is equal to their right to 'join' national unions. Also they have the right under Section 9 (a) to designate a union they form themselves or a national union, as it best suits them. *Obviously this included the right to revoke a designation of a national union as their bargaining agent.*" (Emphasis added).

In *NLRB v. American Manufacturing Co.*, 106 F. 2d 61 (2nd Cir.), the employer had committed unfair labor practices as in *Hollywood-Maxwell, supra.* The Second Circuit there said, page 68:

> "While we hold that there was substantial evidence before the Board on which they might find that T. W. O. C. had not then been displaced as bargaining agent, we feel no certainty that this union *is at present the choice of the employees*, particularly in view of the fact that it was stipulated in the record that a majority of the employees if called as witnesses would testify that they do not want the T. W. O. C. of the C. I. O. to represent them in collective bargaining with the Company." (Emphasis added.)

In the instant situation the employees who testified are on record as opposing the Teamsters. A further similarity between the two cases is a time lapse of at least two years between the signing of the authorization cards and the court decision.

In *NLRB v. Acme Air Appliance Co., Inc.*, 117 F. 2d 417, 421 (2nd Cir.), the court again considered a Board order to recognize and bargain with a union. It was not clear, as of the date of the court's decision what was the employees' choice of bargaining agent. In that case the designation cards were effective for one year. The court would not presume the agency to last beyond that time, and

remanded the case to the Board either to hold an election or to take testimony as to the employees' wishes. The court relied on *NLRB* v. *American Manufacturing Co., supra, NLRB* v. *National Licorice Co.*, 104 F. 2d 655 (2nd Cir.), *aff'd*, 309 U. S. 350 (1940), and *Stewart Die Casting Corp.* v. *NLRB*, 114 F. 2d 849, 858 (7th Cir.), *cert. denied*, 312 U. S. 680 (1941).

While in the instant case there was no time limit in the designation cards, this means that the time limit is a reasonable one. Such reasonable time has long since passed, and in view of the turnover of personnel in the plant, not attributable to any act of the employer, the question of representation according to the wishes of the employees is highly in doubt.

Cases which hold that stability and certainty in labor relations demand that employees not lightly change their bargaining representatives are inapplicable.[5] In those cases, either certification had issued or the union had been recognized and dealt with before the employees changed their minds. The case of *Brooks* v. *NLRB*, 348 U. S. 96 (1954), is distinguishable. There certification had issued, and subsequently the employer refused to bargain on the claim that the employees had changed their minds. The Court's rationale in ordering bargaining was based on the

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[5] *E.g.: NLRB* v. *Botany Worsted Mills*, 133 F. 2d 876 (3rd Cir.), *cert. denied*, 319 U. S. 751 (1943); *NLRB* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64 (3rd Cir.); *NLRB* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541 (2nd Cir.), *cert. denied*, 323 U. S. 714 (1944); *Poole Foundry and Machine Co.* v. *NLRB*, 192 F. 2d 740 (4th Cir.), *cert. denied*, 342 U. S. 954 (1952); *NLRB* v. *Appalachian Electric Power Co.*, 140 F. 2d 217 (4th Cir.). *Contra: Mid-Continent Petroleum Corp.* v. *NLRB*, 204 F. 2d 613 (6th Cir.), *cert. denied*, 346 U. S. 856 (1953); *NLRB* v. *Standard Steel Spring Co.*, 180 F. 2d 942 (6th Cir.); *NLRB* v. *Inter-City Advertising Co., Inc.*, 154 F. 2d 244 (4th Cir.); *NLRB* v. *Cherokee Hosiery Mills*, 196 F. 2d 286 (5th Cir.).

Senate Reports on passage of the Taft-Hartley Act. At page 100:

> "In order to impress upon employees the solemnity of their choice, *when the Government goes to the expense of conducting a secret ballot*, the bill also provides that elections in any given unit may not be held more frequently than once a year." (Emphasis added.) S. Rep. No. 105, 80th Congress, 1st Session 12.

The Court has indicated that the only designation which freezes employees is a *formal* one. At page 103:

> "The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the *formally designated union* is not conducive to that end, it is inimical to it. Congress has devised a *formal* mode for selection and rejection of bargaining agents, and has fixed the spacing of *elections* with a view of furthering industrial stability and with due regard to administrative prudence." (Emphasis added.)

The foregoing equates the *formal* designation with an *election*. Again, at page 104:

> "To be sure what we have said has special pertinence only to the period during which a *second election* is impossible. But the Board's view that the year period should run from the date of *certification* rather than the date of *election* seems within the allowable area of the Board's discretion in carrying out congressional policy." (Emphasis added.)

It is submitted that the Board and the court below have expanded the *Brooks* decision, *supra*, far beyond what this Court intended. Absent such *formal* designation and certification, the employees have the unqualified right to change

their minds, especially where there is no contract to act as a bar. There is no time limitation on such right to change. Review should be granted in this case, among other reasons, to clarify the intent of Congress that the only formal designation which freezes the employees for a year is a secret ballot or a consummated valid contract. In this case the facts are otherwise, and the employees could change their minds. *NLRB* v. *Cherokee Hosiery Mills*, 196 F. 2d 286 (5th Cir.); *NLRB* v. *Reeder Motor Corp.*, 202 F. 2d 802 (6th Cir.).

3. Under the circumstances of this case, the order to bargain is punitive rather than remedial. The court below erred in granting enforcement of a punitive order.

The power of the Board to command affirmative action is remedial, not punitive. *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 235-36 (1938); *Pennsylvania Greyhound Lines, Inc.* v. *NLRB*, 303 U. S. 261, 267-68 (1938). In *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7, 11 (1940):

> "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act would be effectuated by such order.' We have said that the power to command affirmative action is remedial, not punitive. . . . We adhere to that construction."

In this case we have the additional fact that the punitive effect of the order *is on the employees*. The record shows

that 10 of the thirty employees involved in the August 13 meeting had left at the time of the hearing, January 25, 1960 (R. Vol. I, pp. 53-54). This voluntary turnover has continued.[6] We are now almost three years away from the time and group involved or affected by the unfair labor practice. Much of this long delay is due to the Board itself. It took thirteen months for the Board to reach decision after the Trial Examiner concluded hearings (R. Vol. I, p. 54). Due to turnover and time the effects of any unfair labor practices have long since been dissipated.

Thus, in effect, the court below sustained an order which visits compulsory representation on a group of new employees, who had nothing to do with the alleged unfair labor practices, and could not have been affected by it.

If *arguendo* we were to concede that under some circumstances compulsory bargaining is an acceptable kind of affirmative relief, does this apply where the rights of innocent employees are affected under Section 7? It is submitted that the court below did not resolve this question in accordance with the policies of the Act.

The Board's power is not unlimited. Its orders are permissible "unless it can be shown that its order is a patent attempt to achieve ends other than those which can be freely said to effectuate the policies of the Act." *Virginia Electric Light and Power Co.* v. *NLRB*, 319 U. S. 533, 540 (1943). In *NLRB* v. *Seven Up Bottling Co. of Miami*, 344 U. S. 344, 349 (1953):

> "This is not to say that the Board may apply a remedy it has worked out on the basis of its experience, without regard to circumstances which may

[6] Actually, as of the time of the argument before the Court of Appeals only six of the original card signers remained, one of them being a foreman. This fact was set forth in counsel's brief, and mentioned in the court's opinion (Appendix C, p. 39).

> make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act."

At page 348:

> "It seems more profitable to stick closely to the direction of the Act by considering what order does, . . . and what order does not, bear appropriate relation to the policies of the Act."

4. The decision of the court below is in conflict with decisions of other circuit courts and with its own decisions, sustained by this Court. Counsel is familiar with *Franks Bros. Co.* v. *NLRB*, 321 U. S. 702 (1944), holding that a compulsory bargaining order is permissible. One must look at the circumstances. There, an aggressive, old-style anti-union campaign was waged, even to the extent of threatening to close the business. This is a vastly different situation from the instant case, where Mr. Grib stated that the advent of the union would make no difference to him.

Concededly, no two sets of conditions and circumstances are exactly alike. It is submitted that the weight of authority, and current tendencies in modern labor relations thinking would disfavor compulsory union representation in situations like those in the instant case. The court below merely followed stereotyped application of an outworn per se rule, without probing into whether it would effectuate a policy of the Act in this case. In so doing, it left a brightly illuminated path which it was blazing, namely, placing the interests of the employees above those of the union. In *NLRB* v. *Adhesive Products Corporation*, 281 F. 2d 89 (2nd Cir.), the court modified a compulsory bargaining order and directed an election instead. The persuading fact, as here, was a change in circumstance. The court pondered the question, page 91:

> "Under these circumstances what relief is best calculated to give to the employees the rights to which they are entitled? First, they should not be made the pawns of any union, the company, or the Board. Second, they should have an opportunity to express their choice in the manner provided by law."

In differentiating seemingly contradictory holdings, the court said, at page 92:

> "Despite the statement in *NLRB* v. *Idaho Egg Producers*, (9th Cir.) 1956, 229 F. 2d 821, 823, that 'an employer may not set up as a justification for its refusal to bargain with a union the defection of the union members which it had itself induced by unfair labor practices, even though the consequence is that the union no longer has the support of the majority,' the actual facts disclosed that the 'Respondent has made no showing of a change in conditions.' Even where employees had bargained for a short time with a union which had a clear majority this did not preclude a change (*NLRB* v. *Mayer*, 5th Cir., 1952, 196 F. 2d 286)."

The approach of the 2nd Circuit in ordering elections rather than compulsory bargaining had a forerunner prior to *Franks Bros., supra*, in the dissent of Judge Soper in *NLRB* v. *Appalachian Electric Power Co.*, 140 F. 2d 217 (4th Cir.), page 224:

> "Even in cases in which the union's loss of majority is attributable to wrongful conduct on the part of the employer or the employees, it has been decided that the Board's order to recognize the union cannot be enforced when it fails to face the realities of the situation. Such an order was reversed in *N.L.R.B.* v. *Fansteel Corp.*, 306 U. S. 240. . . . To give it (the Board's order) effect in this case will uphold the Board's power, but it will deny rights to working men which the Board was created to protect."

In *NLRB* v. *Marcus Trucking Co.*, 286 F. 2d 583 (2nd Cir.), the court below ordered an election, rather than compulsory bargaining, and distinguished seemingly earlier contradictory holdings, 594-95:

> "... I do not think the cited decisions prescribe so iron-clad a rule as to prevent our imposing such a condition here. In *International Ass'n of Machinists* v. *NLRB*, 311 U. S. 72 (1940), there had been a long history of management favoritism to the established and hostility to the aspiring union; and in *Franks Bros. Co.* v. *NLRB*, 321 U. S. 702, 703 (1944), the employer had 'conducted an aggressive campaign against the Union, even to the extent of threatening to close its factory if the union won the election.' The Court's statements as to the discretion that must be allowed the Board to determine when the effects of the forbidden conduct had been eradicated must be read against that background. In *NLRB* v. *Stow Manufacturing Co.*, 217 F. 2d 900, 905 (1954), cert. denied 348 U. S. 964 (1955), there were findings 'that, not only were the respondent's practices calculated to * * * exert a telling effect to turning the men against the Union, but that they "did" so.' None of this is present here. ... We fail to see how that would be promoted by forcing respondent to recognize a union whose claim to contract bar protection expired more than eighteen months ago, which ceased to represent the employees over a year before that, and which may not be their choice today, when an election can so easily tell. ... The proper course here is to reinstate the 1957 contract insofar as it relates to wages and working conditions, as the Board did, but to suspend union security provisions and the selection of a bargaining representative until the employees have had a chance to make this choice for themselves in a Board conducted election."

This decision to hold an election was in accordance with earlier ones, *NLRB* v. *National Licorice Co., supra,* (sustained by this Court) and *NLRB* v. *American Manufacturing Co., supra.*

The *Adhesive Products* and *Marcus Trucking* approach was again followed in *Perry Coal Co.* v. *NLRB,* 291 F. 2d 126 (7th Cir.) and *NLRB* v. *Superior Fireproof Door & Sash Co., Inc.,* 289 F. 2d 713 (2nd Cir.). There the court conditioned the enforcement of a bargaining order upon the outcome of an election. At page 724:

> "We are fully cognizant of the arguments why in many cases a *certified* union ousted by unfair labor practices of an employer should not be subjected to an election, but these have more force in cases of illegal assistance to a rival union or of the violent anti-union practices of earlier years than to anything shown here. Nor may we forget that the interests to be protected are primarily those of the employees, importantly including, of course, their right to effective union representation than of the union itself." (Emphasis added.)

This Court followed the approach of employee choice in *International Ladies Garment Workers Union* v. *NLRB,* 366 U. S. 731 (1961), where an election was ordered. The unfair labor practice (signing a contract with a minority union) and existence under the contract for some months had changed the union's minority status into majority status. The Court considered that it made no difference who committed the unfair labor practice—the employee's rights were paramount. At page 738: "It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights."

It is submitted that the *I. L. G. W. U.* case, *supra,* is precedent for the instant case. There the fact of the unfair

labor practice which changed a minority into a majority cannot be erased. Obviously, the election ordered was only a means of demonstrating a foregone conclusion. Nevertheless, the Court held, in effect, that it is the employees who have the right to make that demonstration, even though in the end it enables the union to profit from an unfair labor practice. At page 740:

> "Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so."

5. The policy objectives of employee choice and restraining unfair labor practices have always posed the problem of which must be first emphasized. "This must be viewed against the broad background of not only the language but also the history, the pattern and purpose of the Act. In that light, the superior equities would seem to lie with the injured but innocent employee. Balancing the conflicting social interests here involved, we believe the dominant interest to be subserved, at the expense of the servient interest which must be sacrificed, is the interest of the employee." *Industrial Cotton Mills* v. *NLRB*, 208 F. 2d 87, 91-92 (4th Cir.), cert. denied, 347 U. S. 935 (1954).

Keeping in mind the policy of the Act, namely, to encourage collective bargaining through representatives of the *employees'* own choosing, this Court should act to make this goal attainable. "The most feasible procedure would appear to be that suggested by Judge Learned Hand in *NLRB* v. *National Licorice Co., supra,* and followed by Judge A. N. Hand in *NLRB* v. *American Manufacturing Co., supra,* namely, " . . . to make the order 'conditional upon the Board's ascertaining by a new election whether the union is now the choice of the majority'. In this way the current wishes of the employees can manifest them-

selves under the aegis of the Board's supervision" *Adhesive Products, supra.*, p. 92.

In the case of *Sperry Gyroscope Company*, 136 N. L. R. B. No. 45, decided March 15, 1962, the Board itself did what petitioner seeks here. There, unfair labor practices of the employer (formation and assistance to a decertification committee) changed the union's majority status to a minority status. Thereafter, the company filed a petition for an election. Nevertheless, the Board's order was a cease and desist order. *It did not order the company to compulsorily bargain with the union.* As to the company's request for an election, in footnote 5, the Board said:

> "The Board does not generally conduct elections during the pendency of unwaived unfair labor practices involving employees in the bargaining unit in which the election is sought. Nor does it conduct such elections prior to the time that the effect of such unfair labor practices as have been found by the Board have been dissipated. Accordingly, the Board sees no objection to the processing of the RM petition at such time as the Regional Director has received notice that Respondent intends to and will comply with the provisions of the Order herein. Such processing may include the holding of such hearings as may be necessary, but an election shall not be held prior to the expiration of the period during which the Notice provided herein must be posted."

The *Sperry Gyroscope Company* case, *supra*, indicates what should be done in this case. If the unfair labor practice charges are not dismissed on the basis of insufficient evidence, then an election should be ordered. The effects of any unfair labor practice have long since been dissipated.

Under the circumstances, the rights of current employees should be paramount to the vindictive desire of the Board to punish the Employer.

Aside from the legal decisions, the whole question of per se rules and blind adherence to them is currently under scrutiny. On February 15, 1962, Board Chairman Frank McCulloch stated:

> "During 1959-1960 the N. L. R. B. was in the Supreme Court on six occasions and lost five of the cases. In 1960-1961, the Labor Board made nine appearances and won three-and-a-half cases. Our losses involved much more significant issues than did our victories. *The common theme of the Supreme Court decisions was that the Labor Board too often ignored the Congressional intent and relied too much on "per se" doctrines. In short, we were told by the Supreme Court to re-examine our approach as well as our end results.*" (emphasis added.)[6]

This is consonant with other modern thinking. Mr. Gerald A. Brown, Board Member, said a few days earlier:[7]

> "But this is not to say that our policymaking authority is unlimited. To see how judicial review effectively operates as a check upon the Board's authority, we have only to turn our attention to April 7, 1961, when the Supreme Court set aside the Board's Mountain Pacific and Brown-Olds doctrines. . . . in a word, the bubble had burst and with it these

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[6] "The How and Why of Recent N. L. R. B. Decisions" delivered by Chairman McCulloch before the American Management Association, Chicago Illinois, February 15, 1962, 49 LRR 385.

[7] "The N. L. R. B. on the New Frontiers" address delivered at the Institute on Labor Law, Duke University Law School, Durham, N. C., on February 9, 1962, 49 LRR 364.

so-called "per se" rules floated to their timely demise.[8]

"I attach particular significance to the Supreme Court's aforementioned tacit indictments of these "per se" rules, perhaps as much because they coincided with my appointment to the NLRB as because they echo my emphatic belief that independent analysis on a case-by-case basis must be substituted for mechanical rules.

"Other Federal Courts have likewise had occasion to criticize the creation and application of rigid rules.

"Fixed rules are easy to apply and provide the parties with knowledge upon which to predicate their actions. These are desirable results and must, of course, be accorded some weight. Certainty necessarily flows from implementation of mechanistic rules, but it is a superficial certainty destined for disrepute. In the words once more of Willard Wirtz, "The price of a precise rule today is anomaly in the results of its application . . ."

"Judge Leedom . . . explicated three major justifications for stare decisis, humility, predictability, and continuing stability.

"Judge Jerome Frank, among many others, had a different view—that the doctrine of stare decisis

[8] Some of the per se rules which have been changed are Brown-Olds reimbursement formula, *Local 60, Carpenters v. NLRB*, 365 U. S. 651 (1961); hiring hall agreements without protective clauses, *Local 357, Teamsters v. NLRB*, 365 U. S. 667 (1961); contracts incorporating union general laws, *NLRB v. News Syndicate*, 365 U. S. 695 (1961); refusal of jurisdiction over classes of employers, *Employees Int'l Union v. NLRB*, 353 U. S. 313 (1959); selection of bargaining unit, *NLRB v. Pittsburgh Plate Glass*, 270 F. 2d 167 (4th Cir. 1959), *cert. denied*, 361 U. S. 943 (1960); determination of appropriate unit, *Sheffield Corp.*, 134 N. L. R. B. No. 122 (1961); organizational picketing, *Local 41, Hod Carriers Union*, 133 N. L. R. B. No. 57 (1961); recognition picketing, *Enoch Ford Sales, Inc.*, 133 N. L. R. B. No. 163 (1961); common situs picketing *Plauche Electric Co., Inc.*, 135 N. L. R. B. No. 41 (1962); unilateral wage increases, *NLRB v. Katz*, *supra*.

seems to mean that certainty outweighs justice. Frank also suggested, however, that a rule should not change retroactively if a person who relied on it would be harmed substantially.

"But Judge Frank agrees with Holmes who labelled 'as one of the misfortunes of the law' that 'ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.' 'The constant effort' Frank adds, 'to achieve a stable equilibrium, resembling sleep, is immature. The welcome of new doubts, the keen interest in probing into the usual, the zest of adventure in investigating the conventional—these are the life-cherishing attitudes . . .'

"One does not lightly or capriciously alter rules that seem to be effective or widely accepted, but too many legal scholars have concluded that even stare decisis yields more uncertainty than certainty.

"And as Justice Jackson has so aptly commented: 'If the law was static and changeless, it could offer little more than an exercise of memory. The real romance of the law is the combination of continuity and change, the reconciliation of stability and progress.'"

The decision of enforcement by the court below of the Board order to bargain seems based on blind acceptance of a per se rule. Whether the employees' interest lies in joining the Teamsters or in having no union is a choice that only they should make. As of today, the majority of the employees who would be eligible to vote are persons who were not on the premises at the time of the commission of the alleged unfair labor practices. It seems anomalous that they should be bound to accept something they may not want, and even be precluded from evidencing their desires in the matter.

Labor relations is one of the most fluid and dynamic aspects of our society. A broad consideration should now be had of the desirability of punishing employers for unfair labor practices at the price of diminishing the rights of employees to make the ultimate decision as to who shall represent them. It is significant that the preamble to the 1947 amendments to the Act[9] discusses the rights of employees as distinguished from the rights of unions. The previous preamble dwelled more on the rights of unions. It is apparent that new trends are in the making, and new concepts may be in order. New insight into the application and meaning of the Act is constantly being acquired. In the light of these constantly changing insights, the decision below is a misinterpretation of the spirit of the Act. Sound national labor policy, in conformity to the spirit of the Act, warrants review of the questions involved, and reversal of the court below.

Conclusion.

For the foregoing reasons, it is respectfully urged that this Court should issue its writ of certiorari to review the decision below.

SANFORD H. MARKHAM,
Counsel for Petitioner,
116 East 68th Street,
New York 21, New York.

Dated: April 26, 1962.

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[9] LMRA, as amended, §1(b) (Appendix A, *infra*, p. 26).

APPENDIX A.

Labor Management Relations Act, 1947, as Amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. §151.

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

SECTION 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid

or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SECTION 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

. . . . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

SECTION 10. . . .

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer

or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * * *

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and

shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 122—September Term, 1961.

(Argued December 6, 1961 Decided January 17, 1962.)

Docket No. 27028

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PHILAMON LABORATORIES, INC.,
Respondent.

Before:

MEDINA, SMITH and MARSHALL,
Circuit Judges.

Petition for enforcement of an order of the National Labor Relations Board, 131 N. L. R. B. No. 14, finding Philamon Laboratories, Inc., guilty of unfair labor practices and ordering them to cease and desist from certain practices and to take affirmative action including recognition of the union as the bargaining representative of the employees.

Enforcement Granted.

WILLIAM J. AVRUTIS, Attorney, National Labor Relations Board (Stuart Rothman, General Counsel, Dominick L. Manoli, Asso. Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel and Samuel M. Singer, Attorney, National Labor Relations Board, on the brief), *for petitioner.*

SANFORD H. MARKHAM, New York, N. Y., *for respondent.*

MARSHALL, *Circuit Judge:*

The National Labor Relations Board found respondent violated §8(a)(1), (2) and (5)[1] of the National Labor Relations Act, as amended, and now petitions for enforcement of its order pursuant to §10(e).[2] Having reviewed the record, including that portion which "fairly detracts" from the findings of the Board, we hold the findings are supported by substantial evidence and conclusive upon us. §10(e); *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488 (1951). Because the remedy sought is appropriate, we grant the petition.

Respondent maintains a plant in Westbury, New York, and is engaged in the manufacture, sale and distribution of electronic products. The parties have stipulated as to the appropriate bargaining unit. As a result of dissatisfaction arising primarily from respondent's indifference to employee grievances, the operation of the existing profit-sharing plan, wages, and the lack of sick-leave provisions, some sixteen employees signed applications and bargaining authorizations for Local 868, International Brotherhood of Teamsters by August 5, 1959. There were then twenty-nine employees in the unit. On Thursday, August 6, respondent received a telegram from the union claiming to represent "the majority of your employees" and requesting an early appointment for purposes of negotiating a collective agreement. Respondent made no reply. On August 7, Brückner,

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[1] 29 U. S. C. A. §158(a)(1), (2), and (5).

[2] 29 U. S. C. A. §160(e).

Local 868's business representative, telephoned respondent and asked to speak to its president, Grib. After being informed Grib could not be disturbed at that time, Bruckner left his name and requested that Grib call back. Grib failed to do so. On Monday, August 10, Bruckner and another representative of Local 868 went to the plant and asked to see Grib. They were informed that Grib had gone on vacation. Shinerer, the plant manager, told them Grib was expected back on Thursday or Friday. Shinerer said he would be in touch with Grib during the week and if they would call him, Shinerer, on Wednesday, the 12th, an appointment would be arranged for later in the week.

The same day, August 10, the union received two more authorizations, making a total of eighteen, and filed an election petition with the Board. Respondent received a letter from the Board's Regional Director concerning this before 3:00 P.M., on Thursday, August 13. On Wednesday, the 12th, Bruckner called Shinerer at the plant and was told he was gone for the day but would be in the next morning. Bruckner called the next morning, Thursday, and was told Shinerer was not in but was expected about 10:00 A.M. Bruckner asked that Shinerer return the call. Not having received a return call, Bruckner called the plant again at 4:00 P.M. He was told Shinerer was in conference and could not be disturbed, but would call Bruckner back. He did not.

Bruckner and the other representative went to the plant again the next morning, August 14, at 9:30 A.M. They asked to see Grib and, after being informed he was not in, talked to Shinerer. The latter told them to call back at noon. When asked what time he went to lunch, Shinerer replied, "I never go out." Bruckner expressed a desire for a negotiated recognition without an election and offered to show the authorization cards to an impartial person such as the neighborhood rabbi, priest or minister. Shinerer stated the decision was for Grib to make. Between 1 and 1:30, Bruckner called the plant and was told everyone was in conference but that he should call back in an hour. Between 2:15 and 2:20 p.m., he called back, asking for

Shinerer or Grib and was told they were out to lunch. Having been assured by the operator that they were receiving his messages Bruckner asked that they call him back. They never did.

Although Grib had been indifferent to the employees' grievances for many months, he underwent a marked change of attitude upon his return to the plant on August 13. Anne Dee, a vigorously anti-union employee, requested that he call a meeting of all employees to discuss the union situation. Although Grib was wholly inaccessible to the union and doggedly avoided any contact with it, he immediately adopted Dee's suggestion. The meeting, which lasted an hour, was held that day on company time. Grib told the employees of the Teamsters' claims and of the election petition. He then asked for comments, and several employees spoke. As for the wage issue, Grib stated there had been a raise "in the fire" for a few months which would be granted whether or not there was a union. He made no comment upon the profit-sharing plan but said he was against sick leave. He further stated that his lieutenants had let him down in not letting grievances get through to him.

The next day, Friday, August 14, a committee of employees, apparently led by Anne Dee and purporting to speak for those not present, asked to see Grib. They were admitted to his office within ten minutes. Grib repeated his earlier statement as to a pay raise and assured them they were going to get it. He also stated he was willing to do away with the profit-sharing plan and increase regular wages by a corresponding amount. The committee suggested a particular sick leave plan, and Grib indicated he would look favorably upon it although he desired time to think it over. He also told the employees they "would get a better deal if [they] * * * passed the union by." At one or both of these meetings, Grib suggested the employees form their own committee to present such issues and indicated his willingness to deal with such a group. Immediately after this conference, the employees held a meeting of their own,

and one Cotrufo related what had occurred in Grib's office and suggested the formation of a committee to negotiate with Grib.[3] Ultimately, this occurred, but the committee has since been inactive. At all times, Grib assured the employees they could have the Teamsters if they so desired. After work that day, two employees, representing the rest, went to Bruckner and asked the union to hold off for sixty days to see if Grib lived up to his promises.

On Monday, August 17, Shinerer polled the employees as to whether they wished to abolish the profit-sharing plan. A majority said they did. Beginning with the wages of that week, each employee received an increase of ten cents an hour and were told the additional amount represented the conversion of the profit-sharing plan to cash payments. Grib also questioned employee Trockel on the 17th. After describing what had occurred on Friday when Trockel was absent, Grib asked him what he thought about it. Trockel indicated he would go along with the majority, and Grib said he and another employee who had been union adherents did not have to worry about a "witch-hunt." On September 25, respondent instituted a sick-leave plan in accordance with the employees' proposal. On November 1, the general wage increase promised was instituted.

The union's charge was filed on August 21, and the regional director approved the withdrawal of the election petition on August 24. On the basis of the findings above, the Board concluded respondent had violated §§8(a)(1), (2) and (5) of the Act. The order directs respondent to recognize and bargain in good faith with Local 868, and to cease and desist from engaging in certain other unlawful conduct.

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[3] Cotrufo was an assistant foreman and in fact acting foreman that day. Nevertheless, the trial examiner found the speech could not be attributed to respondent. We accept that finding.

The §8(a)(5) Violation[4]

The act imposes a duty to bargain in good faith upon request whenever a labor organization has been designated by a majority of employees in an appropriate bargaining unit. The employer must recognize and bargain with such an organization whether or not it has been certified by the Labor Board. *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956); *N. L. R. B.* v. *Sunrise Lumber & Trim Corp.*, 241 F. 2d 620 (2 Cir. 1957), cert. denied 355 U. S. 818 (1957). To be sure, an employer laboring under a good faith doubt as to a union's majority status need not extend recognition. Nevertheless, in the absence of such a doubt, the employer has no vested right to an election. *N.L.R.B.* v. *Trimfit of California*, 211 F. 2d 206 (9 Cir. 1954).

Respondent contends the union in fact did not have a majority because three designation cards were either invalid or not proven genuine. These contentions are baseless. Employee LaDisa testified he was told he would have no friends in the shop if he told his aunt, Anne Dee, that he had signed a card. This is hardly sufficient to indicate his bargaining authorization was coerced. Employee Manno was told on August 4 that a majority of the employees "wanted" a union, even though a majority had not signed designation cards by that date. Manno's testimony indicates he agreed with that estimate of the situation, and there is no evidence to show such was not the case. No representation was made that a majority had actually signed up. These circumstances distinguish the present case from *N. L. R. B.* v. *Rohtstein & Co.*, 266 F. 2d 407 (1 Cir. 1959) where a representation that a majority had signed up was shown to be false. The third card,

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[4] §8(a)(5) reads in part:

"§8(a) It shall be an unfair labor practice for an employer—

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees * * *"

allegedly signed by employee King, was admitted into evidence without testimony as to its authenticity. The trial examiner found, however, the signature matched a concededly genuine signature of King. In the absence of any showing to the contrary, this is sufficient to support a finding of authenticity. See 28 U. S. C. §1731.

Respondent asserts the union's request for bargaining was defective because it failed to specify a particular bargaining unit but referred only generally to "your employees." Respondent knew, however, of the unit involved by means of the Regional Director's letter which was received before the August 13 meeting. Moreover, respondent's conduct was hardly prompted by uncertainty over the bargaining unit. It never sought to clarify this matter, or any other, with the union, and the nature and size of respondent's operations are not such as to create complicated unit problems. In view of Grib's conduct in negotiating directly with the employees involved, the fairer inference would seem to be that he knew exactly what group the union was talking about.

Finally, respondent contends it had a good faith doubt as to the union's majority status. The record shows, however, that respondent in fact deliberately shut its eyes to the facts of its industrial life and assiduously avoided giving the union any opportunity to substantiate its claims. Such conduct is not indicative of good faith. Respondent in fact withheld recognition merely to gain time to dissipate the very majority which it now contends was in doubt. See *N. L. R. B.* v. *Epstein*, 203 F. 2d 482 (3 Cir. 1953), cert. denied 347 U. S. 912 (1954). Nor is respondent's alleged lack of an anti-union bias a defense. A refusal to bargain with a union designated by a majority and promises of benefit employed as inducements to leave the union violate the Act. *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678 (1944). The fact that such conduct is accompanied by assurances of free choice does not remove it from the ambit of the statute when the record as a whole demonstrates the unlawful purpose. *Joy Silk Mills* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950); *N. L. R. B.* v. *Stow Manu-*

facturing Co., 217 F. 2d 900 (2 Cir. 1954), cert. denied 348 U. S. 964 (1955). The record before us convincingly demonstrates that purpose.

The 8(a)(1) Violation[5]

The Board found that Grib's promises to the employees on August 13 and 14 (and to employee Trocke on August 17), and their subsequent fulfillment, were violations of §8(a)(1). Promises of benefit designed to induce disaffection from a union violate that section. *Medo Photo Supply Corp.* v. *N. L. R. B.*, *supra*; *Jay Silk Mills* v. *N. L. R. B.*, *supra*. The context surrounding Grib's conduct indicates such a purpose. The employees were all aware of the union's demand for recognition, and Grib's sudden concern for their grievances, in contrast to his previous indifference, had an unmistakable meaning for them. While he assiduously avoided all contact with union representatives, he was more than willing to bargain directly with the employees. Indeed, he was quite anxious to discover why the employees wanted a union or, to put it another way, how much it would cost him to get rid of the union. Having learned the price, he then met it. He assured the employees that better procedures for processing grievances would be worked out, that he would deal with an employee committee, that a pay raise which had been "in the fire" but was theretofore unannounced would be granted, that desired changes in the profit-sharing plan

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[5] §8(a)(1) reads:

"§8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights granted in section 7 of this title."

§7 provides in part:

"§7—Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. • • •"

would be made, and that the sick-leave plan proposed by the employees would be given favorable consideration.[6] Much of this was repeated in the individual interrogation of Trockel on Monday.[7] Moreover, while he was making the promises in question, Grib told the employees they would get a "better deal" by forgetting the union. The clear implication of the timing and context of these events was that the employees would receive the promised benefits if they abandoned the union.[8] The net result of Grib's conduct was a request to the union by the employees that it hold off for sixty days so they might see whether Grib lived up to his promises. The Board's conclusion that Grib intended and desired such a result is supported by substantial evidence and binding upon us.

The §8(a)(2) Violation[9]

On August 14, respondent openly negotiated with a hastily assembled committee of employees. This was done even though the union had bargaining authorizations from

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[6] Respondent has emphasized the fact that Grib repeatedly stated the raise had been "in the fire" for months. The Board, however, relied on the timing of the announcement and the context in which it was made. We agree with the Board that under the circumstances of this case, the fact that respondent may have had the raise in mind before the organizational activity is not of great significance.

[7] We do not pause to decide whether this interrogation, viewed in isolation, violates the Act. The Board order prohibiting further interrogations in the context of these unfair labor practices is not improper. Cf. *N. L. R. B.* v. *Firedoor Corp. of America*, 291 F. 2d 328, 331-2 (2 Cir. 1961).

[8] Respondent's reliance upon §8(c), the "free speech" provision, is misplaced. That section explicitly denies protection to speech containing a "promise of benefit."

[9] §8(a)(2) provides in part:

> "§8(a)—It shall be an unfair labor practice for an employer—
>
> • • • • • •
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it • • •"

a majority of employees and had requested recognition. Grib further suggested to the employees the formation of a standing "grievance committee" to negotiate with him at future times over matters similar to those which had caused the dissatisfaction. The committee was designed to be a labor organization within the meaning of 2(5) of the Act. Cf. *N. L. R. B.* v. *Cabot Carbon Co.*, 360 U. S. 203 (1959). Ultimately, it was formed but was inactive. There can be no question but that respondent gave support and assistance to the August 14 committee. Grib negotiated with it even though he was bound by law to recognize Local 868. He also suggested the formation of the standing committee and assured the employees of his willingness to deal with it. When members were finally chosen, two supervisory employees were present at the selection. These activities constitute unlawful support within 8(a)(2). See *International Association of Machinists, Lodge No. 35* v. *N. L. R. B.*, 311 U. S. 72 (1940); *N. L. R. B.* v. *Stow Manufacturing Co.*, *supra*.

The Remedy

The Board has ordered, *inter alia*, that respondent recognize and bargain in good faith with Local 868. Respondent asserts, however, that only six of the original eighteen union adherents remain in the bargaining unit. On this basis, it is argued, the appropriate remedy is not recognition but an election. Respondent relies in particular upon our decisions in *N. L. R. B.* v. *Adhesive Products Corp.*, 284 F. 2d 89 (2 Cir. 1960); *N. L. R. B.* v. *Marcus Trucking Co.*, 286 F. 2d 583 (2 Cir. 1961); and *N. L. R. B.* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713 (1961).

In *Adhesive Products* we directed an election because the employees' initial choice was made in an atmosphere which did not allow "opportunity of giving the matter due and proper reflection and consideration." In *Marcus Trucking*, the employer had recognized a majority union in violation of its obligations under the Board's contract bar rules. No element indicating employer interference with employee

free choice was present, however, for the contract bar rules themselves are intended to allow considerations relating to stability to govern over employee choice in certain circumstances.[10] In *Superior*, an election was directed because of an "inordinate delay" in the Board's proceedings and because the union had abandoned the employees for six months after certification and had not represented them for nearly four years.

The present case, however, does not involve such special considerations. The sole circumstance advanced by respondent to support its contention is that in the process of normal personnel turnover many original union adherents have left its employ. While respondent's argument is appealing in some aspects, we do not believe this is a case in which the Board has applied "a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 349 (1953).

In *Frank Bros.* v. *N. L. R. B.*, 321 U. S. 702 (1944), the Supreme Court rejected the argument pressed here with the statement, "That the Board was within its statutory authority in adopting the remedy which it has adopted * * * seems too plain for anything but statement * * *", 321 U. S. at 705. Over seventeen years have passed since that decision, and the National Labor Relations Act has twice undergone searching Congressional revision in light of past experience. That decision, however, has not been upset, and the presumption of Congressional approval is strong indeed. *N. L. R. B.* v. *Gullett Gin Co.*, 340 U. S. 361 (1951). We followed *Frank Bros.* in *N. L. R. B.* v. *Stow Manufacturing Co.*, *supra*, and enforced a Board order compelling recognition without an intervening election. The rationale was premised on the Board's expert conclusion

[10] These rules prohibit recognition of a majority union by an employer for a certain length of time when he is bound by contract to another union which he validly recognized but which subsequently lost its majority.

that the employer's illegal conduct had turned the employees against the union even though there was not, in the language of Judge Learned Hand, "the proverbial scintilla to justify the * * * conclusion." We find the present case even stronger, however, for after the meetings on August 13 and 14, the employees asked the union to hold off for sixty days to see if Grib lived up to his promises. It is clear, therefore, the unfair labor practices here did in fact cause the union's loss of a majority.[11]

Even without such established precedents, we would be hard pressed to reject this exercise of the Board's remedial powers. The union lost majority status because of respondent's violations of the law. The only effective remedy left in the present case is the requiring of recognition. And, indeed, as far as future cases are concerned, a denial of power to the Board here might well encourage employers to refuse to bargain, commit the ancillary violations, fight the unfair labor practice charges to the courts, and then rely upon the inevitable intervening turnover in personnel to ward off the only effective remedy remaining. In any case, we cannot say such a rationale may not be adopted and applied by the specialized agency entrusted by Congress with the principal enforcement duties under the Act.

Enforcement Granted.

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[11] Respondent seeks to distinguish *Frank Bros.* on the grounds the employer in that case conducted "an aggressive campaign against the union." That factor, however, is relevant only to the issue of whether the employer's refusal to bargain and/or ancillary violations caused the union's loss of majority status. In light of the record and findings before us, therefore, *Frank Bros.* is not distinguishable.

APPENDIX C.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. PHILAMON LABORATORIES, INC., Respondent.	No. 27028

Decree.

Before: MEDINA, SMITH and MARSHALL, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on April 11, 1961. The Court heard argument of respective counsel on December 6, 1961, and has considered the briefs and transcript of record filed in this cause. On January 17, 1962, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceedings be enforced, and that Philamon Laboratories, Inc., its officers, agents, successors and assigns abide by and perform the direction of the Board in said order contained.

HAROLD R. MEDINA
Judge, United States Court of Appeals for the Second Circuit.

THURGOOD MARSHALL
Judge, United States Court of Appeals for the Second Circuit.

Filed: February 1, 1962.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 909

PHILAMON LABORATORIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 30–41), is reported at 298 F. 2d 176. The Board's Decision and Order (R. 1–5)[1] are reported at 131 NLRB 80.

JURISDICTION

The decision of the court of appeals was entered on January 17, 1962 (Pet. 30–41), and a decree was entered on February 1, 1962 (Pet. 42). The petition for a writ of certiorari was filed on April 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] References designated "R." are to the portions of the record printed as an appendix to the Board's brief in the court below.

QUESTIONS PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that petitioner violated Section 8(a)(5), (2) and (1) of the Act by refusing to bargain with the union representative selected by a majority of its employees; by interfering in the formation of and providing assistance to employee collective bargaining committees; by promising and granting employee benefits for withholding or withdrawing support from the union; and by interrogating employees about activities on behalf of the union.

2. Whether the Board properly ordered petitioner to bargain with the union, even though it may have lost majority support, where such loss was attributable to the unfair labor practices.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 26–29 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On August 6, 1959, the union,[2] holding authorization cards from a majority of the employees in an appropriate unit, sent petitioner a telegram advising of its majority status and requesting that petitioner telephone the union, at a stated number, to arrange an early meeting for the purpose of negotiating a collective bargaining agreement (R. 12, 14, 15, 19; 54–55,

[2] Local Union 868, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

60–65, 67–74, 76–77, 80, 86–87).[3] Petitioner failed to respond to this telegram or to comply with any of a number of subsequent requests for recognition and bargaining which the union made between August 6 and August 14 (R. 19–23; 87–91). Company personnel in positions of authority were uniformly unavailable when the union called,[4] and messages which the union left with petitioner were never answered although union representatives were assured that they had been delivered (R. 12, 13, 19–23; 90, 98).[5]

While the union was trying unsuccessfully to communicate with someone with authority to act on its request for recognition, Anne Dee, a staunchly anti-union employee, was able to make an appointment with petitioner's president, Boris Grib, on August 13, to urge him to call a meeting of all employees to discuss the union's claim of majority (R. 12–13, 23–24; 222–225). This request was immediately granted

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[3] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[4] Petitioner's president was described as "in conference" (R. 13, 19, 23; 87–88, 92), "on vacation" (R. 12, 20; 88), or "out to lunch" (R. 13; 92), when the union tried to reach him. The plant manager was said to be "not in yet" (R. 13; 90), or "gone for the day" (R. 12, 21; 90).

[5] On August 14, for example, the union offered to submit its authorization cards for a check by any impartial person and to withdraw its request for recognition if it was found not to possess a majority. Petitioner's plant manager answered, however, that the Company's president, who had not come in yet, would have to decide this question and suggested that the union representatives call back. One of the representatives, accordingly, telephoned the plant twice that afternoon, but was unable to reach either the plant manager or president and finally left a message for one of them to call him back; the call was never returned (R. 13, 22–23; 90–92, 98).

and a meeting was called on company time (R. 13, 24–25; 225). In the course of the meeting, which lasted an hour or more, Grib told the employees of the union's telegram requesting recognition and of a union petition for representation which had been filed with the Board on August 10. He added that the union might not really have the support of a majority, and that there would be an election in which it would be up to the employees to decide whether they wanted a union (R. 13, 20–21, 24, 25; 55, 103–104, 106, 120–121, 127, 131, 134, 154, 171, 225). In response to employee complaints that petitioner had been failing to process their grievances, Grib answered that he had been very busy and that his staff had "let him down" by failing to bring the employees' problems to his attention (R. 25; 104). He stated that the employees should have come directly to him with their complaints, either on an individual basis or through a grievance committee, and that such a committee could still be formed (R. 27–28; 105, 156). After listening to employee demands concerning wages, sick leave and profit sharing, President Grib told them that a pay raise had been "in the fire" for a few months and would be granted whether the union got in or not (R. 25–26; 105, 120, 123, 132, 141, 156).

The next day, Friday, August 14, an employee committee of eight or nine was ushered into President Grib's office to present certain "gripes" on behalf of all the employees (R. 13, 26; 137, 159–160, 230–231). (Representatives of the union were still attempting, without success, to see or speak to Grib (n. 5, *supra*)).

Grib reiterated his promise of a pay raise, promised to give consideration to a proposal on sick leave which he said sounded "plausible," and stated that, in view of the strong feeling about the profit-sharing plan among the employees, he would do away with it if they wished and give them its equivalent in wages (R. 27; 144, 160, 176–177). He added that, "at this particular time, he was restricted in making promises of any kind whatsoever," but that the employees should "certainly feel free at any time" to see him about any problems or complaints they wanted to raise (R. 29; 235). Grib further told the employees: "whether you come in as a union committee or whether you come in individually, my ears have always belonged to the employees in the plant," and stated that "there would be certain definite increases in all kinds of benefits in the future, on a steady basis" and that the employees would "get a better deal" if they passed the union by (R. 29; 126, 235, 237).

Immediately after the committee left Grib's office, the employees, with Company permission, held a meeting of their own in which they discusssed the committee's meeting with Grib and the formation of a standing committee to negotiate with him on a regular basis (R. 39; 140, 146–148, 150, 164–165, 178-179). Some days later, the employees selected representatives for such a committee while two Company foremen stood by, but the committee never functioned or sought to negotiate with petitioner (R. 39, 42; 156–158, 168–169).

The following Monday, August 17, still without a meeting with the union, petitioner's plant manager, Shinerer, asked each employee if he would prefer a pay increase of 10 cents an hour in lieu of participation in petitioner's profit-sharing plan, and a majority said that they would (R. 32; 235–236). In the course of this poll, employee Trockel, who had been absent the preceding Friday, was invited to President Grib's office where Shinerer and Grib told him about the discussion with the employee committee (R. 31; 108–109). When asked what he thought of the 10-cent pay increase, Trockel answered that he was willing to go along with the wishes of the majority (R. 31; 109). As the conversation ended, President Grib told Trockel that he and another employee who had been among the first to sign union authorization cards did not have to worry about their jobs, "there would be no witch hunt" (R. 31–32; 110).

On Friday, August 21, the 10-cent pay raise, voted on the preceding Monday, went into effect (R. 32–33; 216–217). The following Monday, August 24, the employees held a meeting with representatives of the union, at which some of them asked the union to hold off for a while because "they had formed some kind of a group which had been discussing their * * * gripes with Mr. Grib * * *" and, if they "received what they asked for, then they couldn't see why they needed a union to get it for them" (R. 37; 115, 215–216, 246–247).* A number of employees asked for the return

*On August 14, two employees had made a similar request to the union to delay action until it could be determined if President Grib intended to live up to his promises (R. 30; 92–93, 166–167, 183).

of their authorization cards (R. 37; 115, 215). On September 25, petitioner adopted the sick leave plan previously suggested by the employees' committee, and on November 1 put into effect the general wage increase, amounting to 10 cents per hour, which Grib had promised on August 13 and 14 (R. 33; 217, 248).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board concluded that petitioner refused to bargain with the union when it represented a majority of the employees in an appropriate unit, interfered in the formation of and contributed assistance to employee bargaining committees, and coerced its employees in the exercise of their statutory rights, in violation of Section 8(a)(5), (2) and (1) of the Act.[7] The Board ordered petitioner to cease and desist from the unfair labor practices found, and, *inter alia*, to bargain with the union, upon request. (R. 2–8.) Rejecting petitioner's contention that it was justified in refusing to bargain with the union because by August 24 it appeared that some of the employees had withdrawn their support, the Board, quoting from *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 687, stated (R. 37):

> [Petitioner] cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though

[7] In its Decision and Order, the Board adopted the findings, conclusions and recommendations of the Trial Examiner (R. 2).

> the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will.

C. THE DECISION OF THE COURT OF APPEALS

The court below upheld the Board's unfair labor practice findings as adequately supported by the record and enforced the Board's order in full (Pet. 31, 41). The court rejected petitioner's contention that the bargaining part of the order should be conditioned upon the union demonstrating in a Board election that it had majority support, since only 6 of the original 18 union adherents remained in the bargaining unit (Pet. 39). Concluding that the contention was foreclosed by *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 72, and its own decision in *National Labor Relations Board* v. *Stow Manufacturing Co.*, 217 F. 2d 900, the court added (Pet. 41):

> Even without such established precedents, we would be hard pressed to reject this exercise of the Board's remedial powers. The union lost majority status because of respondent's violations of the law. The only effective remedy left in the present case is the requiring of recognition. And, indeed, as far as future cases are concerned, a denial of power to the Board here might well encourage employers to refuse to bargain, commit the ancillary violations, fight the unfair labor practice charges to the courts, and then rely upon the inevitable intervening turnover in personnel to ward off the only effective remedy remaining. In any case,

> we cannot say such a rationale may not be adopted and applied by the specialized agency entrusted by Congress with the principal enforcement duties under the Act."

ARGUMENT

1. Petitioner's first contention (Pet. 7–10) raises the question whether the Board's unfair labor practice findings are supported by substantial evidence. The holding of the court below that those findings are so supported (Pet. 31) does not warrant review by this Court. See *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502. Furthermore, the facts summarized in the Statement and in the court's opinion (Pet. 31–39) make it clear that the Board was fully justified in concluding (R. 2, 37) that petitioner refused to meet and bargain with the union, not because of a good faith doubt that it represented a majority of the employees, but in order to gain time to undermine the union; and that it then embarked on a campaign to achieve that end, by assisting the employees to set up their own bargaining committees and by promising and granting them benefits for withdrawing their support from the union.

2. Petitioner's remaining contention (Pet. 10–25) challenges the propriety of the Board order directing

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[1] The court distinguished its decisions in *National Labor Relations Board* v. *Adhesive Products Corp.*, 281 F. 2d 89; *National Labor Relations Board* v. *Marcus Trucking Co.*, 286 F. 2d 583; and *National Labor Relations Board* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713, on the basis of the "special considerations" there involved (Pet. 39–40). These cases are discussed *infra*, pp. 11–12.

it to bargain with the union.[9] It is petitioner's position that, because almost 3 years have elapsed since the union's original request for bargaining and a turnover in personnel has meanwhile occurred, it is "punitive" and contrary to the policies of the Act to saddle the present employees with the union as their bargaining representative; that a bargaining order should at least be conditioned upon the union demonstrating in a Board conducted election that it enjoys the support of a majority of the present employees. As the court below noted (Pet. 40), this argument, in circumstances similar to those here, was rejected by this Court over 18 years ago in *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702. That decision, which retains its validity today,[10] holds that, where, as here, a union's alleged loss of majority is fairly attributable to the employer's unfair labor practices, he may properly be required to bargain with the union for a reasonable period of time irrespective of the loss of majority. Such an order is remedial rather than punitive, for it is the only effective means of preventing the employer

[9] Petitioner argues (Pet. 10–14) that the enforcement of the bargaining order presents the pure question, not previously considered by the Court, of the right of the employees voluntarily to change their minds after signing union authorization cards. Whether this question would warrant review need not be decided for it is not presented here. The Board found, and was affirmed by the court of appeals, that any changes of mind were the result of the employer's unfair labor practices (R. 36–37; Pet. 38, 41).

[10] See *National Labor Relations Board* v. *Katz*, No. 222, this Term, decided May 21, 1962, slip op., p. 12, n. 16; *National Labor Relations Board* v. *Warren Co.*, 350 U.S. 107, 112.

from benefiting from his original violations of the Act (321 U.S. at 704–705).[11] Contrary to petitioner (Pet. 10–14), this remedy does not forever "freeze" the employees into the union without giving them a chance to change their minds. As the Court further recognized in *Franks* (*id.*, at 705–706), after a reasonable period of time, provided the order has been complied with, "the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships."

The recent cases cited by petitioner (Pet. 16–19), in which the courts have conditioned the direction to bargain upon the outcome of a Board election, are, as the court below noted (Pet. 40), distinguishable on the basis of "special considerations."[12] Assuming *arguendo* the validity of the exceptions drawn in those cases, the court below properly found that they had no application to the instant case. Thus, the shift of majority support in *Marcus Trucking*[13] was found to be "uncoerced" and not attributable to the refusal to bargain, which was of a technical nature. In *Superior*

[11] Petitioner seeks to distinguish the present case from *Franks* on the ground that the employer there conducted "an aggressive, old-style antiunion campaign" (Pet. 16). But, as the court below stated, "[t]hat factor is relevant only to the issue of whether the employer's . . . [unlawful conduct] caused the union's loss of majority status" and where causation "is clear," as it is here, the distinction has no significance (Pet. 41).

[12] The other cases relied on by petitioner (Pet. 10–12) precede the decision of this Court in *Franks*, and thus, to the extent inconsistent with it, must be deemed overruled.

[13] *National Labor Relations Board* v. *Marcus Trucking Co.*, 286 F. 2d 583, 593 (C.A. 2).

Fireproof Door,[14] the loss of majority was viewed as due primarily to the union's virtual "abandonment" of the employees.[15] In *Adhesive Products*,[16] employee sentiment had vacillated rapidly among four different unions, none of which enjoyed a clear majority for any substantial period of time. Finally, in *Perry Coal*,[17] unlike the present case, the union had enjoyed a period of contractual relations with the employer, before the employees "clearly indicated their choice of * * * [another union] as their representative."[18]

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[14] *National Labor Relations Board* v. *Superior Fireproof Door & Sash Co., Inc.*, 289 F. 2d 713, 722 (C.A. 2).

[15] Another factor relied on by the court in *Superior Fireproof Door* to justify conditioning the bargaining order on a new election was the "inordinate delay that characterized the course of [the] proceeding before the Board"; *i.e.*, 471 days had intervened between the filing of the charge and the issuance of the complaint (289 F. 2d at 723). Petitioner seeks to fit the present case in this category. Here, however, the complaint was issued within a month after the charge was filed (Pet. 6), and see *Katz*, *supra*, n. 10.

[16] *National Labor Relations Board* v. *Adhesive Products Corp.*, 281 F. 2d 89, 90–91 (C.A. 2).

[17] *Perry Coal Co.* v. *National Labor Relations Board*, 291 F. 2d 126, 127 (C.A. 7). The limited nature of the holding in *Perry* is shown by the Seventh Circuit's subsequent decision in *National Labor Relations Board* v. *John S. Swift Co.*, April 23, 1962, 50 LRRM 2017, 2020, where the court enforced a bargaining order in a situation analogous to that presented here.

[18] *International Ladies' Garment Workers* v. *National Labor Relations Board*, 366 U.S. 731, and *Sperry Gyroscope Company*, 136 NLRB No. 45, cited by petitioner (Pet. 19, 21), are inapposite, for neither involved a refusal to bargain finding and thus there was no occasion to include a direction to bargain in the Board's order in either case. In *Garment Workers*, the violation consisted of according exclusive recognition to a minority union; the employer was directed to cease recognizing and bargaining with that union, until such time as the Board should direct a new election and an uncoerced majority of the em-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ployees should select the union as their representative. In *Sperry Gyroscope*, the employer had unlawfully fostered and encouraged a decertification movement among the employees; the Board ordered the employer to cease and desist and to post an appropriate notice, and added that, when compliance with this order had been effected, the Regional Director could proceed to an election on a new representation petition which had meanwhile been filed.

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